

Notre Dame Law School

NDLScholarship

Journal Articles

Publications

1999

Tribute to the Honorable Richard Sheppard Arnold for His Service as Chief Judge of the United States Court of Appeals for the Eighth Circuit

Richard W. Garnett

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Law Commons](#)

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

TRIBUTE TO THE
HONORABLE RICHARD SHEPPARD ARNOLD
FOR HIS SERVICE AS CHIEF JUDGE OF
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT



Judge Richard Sheppard Arnold

The Honorable Richard S. Arnold was appointed by President Carter in October 1978 to the District Bench for the Eastern and Western Districts of Arkansas and elevated to the United States Court of Appeals for the Eighth Circuit in 1980, where he serves with his brother, the Honorable Morris S. Arnold. Judge Richard Arnold served as Chief Judge of the Eighth Circuit from January 8, 1992 to April 17, 1998. A graduate of Yale College and Harvard Law School, Judge Arnold clerked for Justice William Brennan of the United States Supreme Court from 1960-1961. He was an associate at Covington & Burling in Washington D.C. from 1961-1964, when he returned to Texarkana, Arkansas to practice law with the firm of Arnold & Arnold. In commemoration of his distinguished service as Chief Judge of the Eighth Circuit, colleagues and friends have authored the following short tributes.

PASCO M. BOWMAN II*

Having served for more than fifteen years with Judge Richard Sheppard Arnold, I feel qualified to write a few words about him. He is a truly remarkable and impressive person. I consider it a great privilege to serve with him on the same federal court of appeals.

At the time of my appointment to the court, Judge Arnold was one of the first of my new colleagues to call and say congratulations. He made it clear he had checked me out with his sources and the word he had gotten back was that I was a good guy, or something to that effect. I replied that I was glad to have passed muster, but that even if I had not, he was stuck with me anyway. We laughed, and our relationship was off to a good beginning. In all the ensuing years, it has never deviated from that good beginning. He is a highly valued colleague and has become a cherished friend.

Our court is notable for its collegiality, its lack of rancor, for the true feeling of warmth and friendship among its members. Part of the credit for that must go to Judge Arnold, particularly during the time of his service as our chief judge. His tact, courtesy, good judgment, and respect for others, as well as his unflagging attention to the business of judicial administration, have set the standard for all of his successors as chief judge.

Since his appointment to the court of appeals in 1980, Judge Arnold has become one of the undisputed leaders of the federal judiciary. His service as chairman of the Budget Committee of the United States Judicial Conference was exemplary. It is not too much to say that he amazed observers with his encyclopedic knowledge of the judiciary's budget, or that he deeply impressed them by the capable way in which he presented the annual budget request to Congress. He similarly distinguished himself in his service as a member of the

* Chief Judge Bowman has served on the United States Court of Appeals for the Eighth Circuit since 1983, and as chief judge since April 1998. Prior to his appointment to the bench, Chief Judge Bowman was Professor of Law and Dean at the School of Law at the University of Missouri in Kansas City.

Executive Committee of the conference. To paraphrase the boast of a certain brokerage firm, when Judge Arnold speaks, people listen.

Judge Arnold is a brilliant and accomplished person. He was first in his undergraduate class at Yale and first in his law school class at Harvard. He clerked for Justice Brennan at the Supreme Court. He successfully practiced law, first with a large firm in Washington, D.C., and then with his family's firm in Texarkana. Under the tutelage of Senator Dale Bumpers, he learned the political ropes in Washington as a member of the senator's staff. Eventually, he ran for Congress but lost in the Democratic primary. In retrospect, we can view his loss as a fortunate one. Had he won a seat in Congress, a judgeship might never have beckoned. As things turned out, in 1978 President Carter appointed him to the district court and the rest is history. Congress's loss was definitely the judiciary's gain.

Judge Arnold has many traits that I greatly admire. Among them is clarity of thought and of expression. His ideas are always well formed, and he knows how to communicate them in a simple and economical fashion. Though steeped in the classics and in classical languages, in his writings and his speech he eschews Latin phrases in favor of plain, easily understood English (except when bantering in Latin with his younger brother, Judge Morris Sheppard Arnold). His clear, uncluttered style augments the quality of his thought, giving added force and persuasiveness to his ideas.

I also greatly admire Judge Arnold's courage in standing up for his principles. He is not one to trim his views about what the law or the constitution requires in the cases on which he sits. He is not often a lonely dissenter, but when he believes the court is in error, he does not shrink from stating his views separately, or from supporting a petition for rehearing *en banc* if he thinks the issue is important enough. He always goes where the law and the facts take him, whether or not the destination is a popular one.

Judge Arnold has demonstrated another kind of courage—the courage to look into the face of severe adversity and to stare it down. Confronted several years ago by a serious illness, he underwent a series of unpleasant and debilitating treatments, and he prevailed. He dealt with the illness stoically, gracefully, and

even with a measure of good cheer, all the while maintaining his heavy work schedule and being extraordinarily productive. I am sure his strong religious faith, as well as the support of his wife Kay and the other members of his family, helped to sustain him throughout this difficult time. We rejoice that he has been restored to good health.

Another trait I greatly admire is Judge Arnold's unfailing courtesy to everyone with whom he comes in contact. His respect for individuals knows no bounds, extending from presidents, members of Congress, and justices of the Supreme Court to the beggar we used to pass almost every morning as we walked to the courthouse in St. Louis. Judge Arnold knew the man's name, always spoke kindly to him, and always put something into his cup. He can be firm when the situation calls for firmness, but his firmness never takes the form of an attack on another person's dignity. In all the years I have known Judge Arnold, I never have heard him utter an unkind word to anyone.

Where to stop? I do want to point out that Judge Arnold is a convivial dinner companion. He also is an excellent golfer. Like his opinions, his shots are crisp and on target. Like his approach to the law, his swing is a model of consistency. And no matter what the situation, his demeanor on the golf course is just as it is elsewhere: unflappable.

Finally, I would comment that Judge Arnold is committed to the institutional well being of the federal judiciary and to keeping the rule of law alive and well. His tireless work on the budget committee and the executive committee of the judicial conference illustrates that commitment, as does his service as our court's chief judge. That commitment is accompanied by a generous spirit toward his colleagues, as witnessed by his stepping down last April, almost a year early, to give me an opportunity to serve as chief judge before I reached the age at which taking up a chief judgeship is barred. I am grateful to Judge Arnold for his generosity and his confidence in me. He believes it is good for our court that more of its members have a turn as chief judge, and I agree with him, for I am learning that the insights and understanding gained from the experience are quite valuable.

To sum up, Judge Arnold is a great judge, a delightful colleague, and a wonderful human being. We are fortunate to know him and to have him in our midst.

GILBERT S. MERRITT*

Richard Arnold's playing partners are in for a treat when his golf ball arrives at the green. He pulls out a 100-year-old putter with a worn, but finely polished, antique wood shaft. His grandfather, a lawyer in Texarkana, first putted with it at the turn of the century. Richard's father inherited it and played with it for many years. Now it is Richard's. No telling how many balls it has rolled into the cup. In Richard's steady hands, as another fifteen footer drops in, the old putter seems like a magic wand with a long memory for how a golf ball will run and break.

But I do not intend to dwell on Richard's golf game. The old putter is not only lovingly connected with Richard's family. It is symbolic of a life and mind rooted in history, with an uncanny memory for people, events and literature, legal and otherwise, and with a sense of balance and moderation based on the Golden Mean and a deep understanding of history.¹ When Richard works, or talks or writes, the ball always seems to drop in the cup.

* Judge Merritt has been a member of the United States Court of Appeals for the Sixth Circuit since 1977, served as Chief Judge from 1989-96, and served as a member and as a Chairman of the Executive Committee of the United States Judicial Conference. Prior to his appointment to the bench, he practiced law in Nashville, Tennessee, and was a member of the faculty at Vanderbilt University Law School.

1. In a fascinating lecture last year at NYU on the problem of constitutional interpretation, as seen through the eyes of James Madison, magnified through the lens of Richard Arnold, Richard has this to say about his own love for history:

The question of the relevance of Madison's views is one you will have to answer for yourselves. My own view is that history is important because it's intrinsically interesting, or, to put it in plain language, history is fun. It may also be of some use in the work we have to do in our own time.

Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 269 (1997), an article that those interested in constitutional history should read as soon as possible.

Richard majored in the classics at Yale and retains to this day his talent for Latin and Greek. A deeply spiritual man, his Biblical learning, like his legal learning and his historical understanding, is a product of a remarkable capacity to combine careful, precise analysis with the ability to synthesize diverse knowledge. It was no accident that in scholarship he ranked first in our class at Yale and at Harvard Law School.

His great love for language (he learned Italian in later life by reading the *Divine Comedy*) has given Richard a poetic writing style—plain, spare, elegant. He recently rebutted the view that Justice Brennan, for whom he clerked in 1960, molded the Warren Court through sheer force of personality and “Irish guile.” In five expressive sentences he catches the essence of Justice Brennan’s role on the Court:

Personality, no doubt, is important. Judges are human beings. They live in bodies and react on a personal level. But judges do not cast votes simply because their backs are slapped in a particularly engaging way. What Justice Brennan did, he did as a lawyer and as a judge, and his mastery of the English language, of the history of the Constitution, and of the technical aspects of the law played at least as big a part in his success at constructing majorities as the warmth of his personality and manner.²

This simple, clear, concise passage expresses a complex idea with a cadence of iambic pentameter typical of Richard’s writing.

I knew that there was something very special about Richard 45 years ago, not long after we sat down next to each other at 8:00 A.M. on September 22, 1953, for our first class as freshmen at Yale College. It was a class in beginning French taught five days a week in a little classroom above Yale’s main Gothic gate, looking out over the New Haven green. When we struck up a short conversation before class began that morning, I was relieved. I thought, “This boy from Arkansas is probably just as unsophisticated and unprepared for Yale as am I, a farm boy from Tennessee.” That idea did not last long. Within two weeks, he and Monsieur Tofoya, our teacher, were conversing back and forth in French. Within a month, Monsieur Tofoya had

2. Richard S. Arnold, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 5 (1997).

put him up in French 20, which required as preparation two good years of high school French. Before the first semester was out, the French Department put Richard into French 30, an advanced class, where they read Beaudelaire, Stendhal and other great French writers.

But I do not want to dwell on how smart Richard Arnold is. Articles like this one tend to overemphasize a judge's intelligence and learning to the exclusion of qualities of the heart like a sense of justice, diplomacy, thoughtfulness, humor, loyalty, tolerance and affection for others. There are many smart people, but only one with the complex mind and spirit of Richard Arnold. It is his heart and character that make all who know him love and admire him.

For his many friends and acquaintances, Richard is a hero and a model—on the one hand, highly competitive, with a great capacity for work and achievement, while at the same time, blessed with an enlarged capacity for sympathy and the ability to put himself into the shoes of another. Even though pressed for time, he cannot pass a beggar by or allow a genuine request for aid to go unanswered. One such time I said, “Richard, the guy is probably an alcoholic or a dope addict.”

He responded in good humor, “You never know, he may be an angel.” In his mind, the guy is just one of God's children in need.

Richard summons what little anger and hostility his nature owns in the face of the bully who takes advantage of the weakness of others. He is instinctively for the underdog and for the liberty and dignity of the little guy. That sentiment runs subtly throughout his opinions, writings and speeches.³ His legal and moral philosophy emphasizes the importance of the claims of the less-

3. For example, his Howard Kaplan Memorial Lecture at Hofstra Law School on the sanctity of trial by jury is a sermon about his faith in the deliberations of “twelve ordinary people,” for whom the expert is no “match.” Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 3 (1993). In this same lecture Richard gives us his thoughts on the relation of reason and emotion in the deliberative process:

And here is the thing I want to tell you—the point: emotion is not a bad thing. In law or anywhere else, we do not often think of it that way, perhaps. We say that the life of the law is reason, but there is more to it than cold rationalism. As Pascal said, “The heart has its reasons, which reason does not know.”

Id. at 35. But he ends with the qualification, “so long as your feelings and your emotions can be tested by reason.” *Id.*

favorable class. Achilles' pitiless enforcers, the myrmidons of the law, are not Richard's friends. He takes basic Christian ethics seriously, reflecting the ancient admonition found in Matthew 25:40: "Inasmuch as ye have done it unto the least of these my brethren, ye have done it unto me." Or as his charming and insightful wife, Kay, said to me once in more modern English: "I was lucky enough to marry the man who is always the last to judge and the first to forgive."

MORRIS S. ARNOLD*

My brother Arnold's distinguished career is too well known to most readers of this journal to make a rehearsal of it here worthwhile. Those who require or desire a primer on it, and a survey of some of my brother's more notable opinions, may consult the contributions noted in the margin.¹ What I want to write briefly about for present purposes has to do with some early influences on his life and thinking that have, I believe, left discernible traces in his jurisprudence, if only one looks at it with a trained and educated eye.

My brother, as everyone knows, possesses a legendary intelligence; indeed, his colleagues sometimes admiringly remark to me on how easy the analysis and solution of legal puzzles is for him. More importantly, my brother is an intellectual. There are lots of differences between being intelligent and being intellectual (there are many brilliant

* Judge Morris Shepard Arnold has served with his brother, Richard S. Arnold, on the United States Court of Appeals for the Eighth Circuit since 1992. Prior to his appointment to the Eighth Circuit, Judge Arnold served on the U.S. District Court for the Western District of Arkansas for six years.

1. Especially useful for this enterprise are the following: William J. Brennan, Jr., *A Tribute to Chief Judge Richard S. Arnold*, 78 MINN. L. REV. 1 (1993); John P. Frank and A. Leon Higginbotham, Jr., *A Brief Biography of Judge Richard S. Arnold*, 78 MINN. L. REV. 5 (1993); Donald P. Lay, *My Colleague—Richard S. Arnold*, 78 MINN. L. REV. 25 (1993); and Patricia M. Wald, *Judge Arnold and Individual Rights*, 78 MINN. L. REV. 35 (1993).

people, for instance, who don't give a fig for ideas), but in this context I use the word "intellectual" to mean someone who believes in the practical consequence of political, philosophical, and legal principles, and in their capacity to produce morally reliable and systematic results. Such people, of course, are very interested in learning, and are consumed with a desire to acquire it. A relevant anecdote will serve to illustrate early signs of my brother's intellectualism rather nicely. When he was a first-year law student at Harvard, I remember telling him that the University of Arkansas had been ranked number 7 in the most recent polls. "Oh?" he replied, with considerable interest. "Which department? Latin? History?" I am not kidding—and neither was he.

The notion that legal problems can be puzzled out, that the mind can solve them by the application of principle, has a distinctly Whiggish cast to it, and it is here that early influences on my brother's modes of thinking may be showing themselves. Ideas and learning were extremely important around our house when we were growing up. One of my early memories is sitting around in our library listening to my sixteen-year-old brother teach our mother ancient Greek. (I wonder if there was anyone else in Miller County, Arkansas, doing that that day?) Our mother wanted to know just about all there was to know, and had an opinion on every subject, which she did not scruple to share with her sons. Her father had been a United States Senator, but despite (because of?) the fact that he had been a big New Dealer, Progressive, and Prohibitionist, she was highly skeptical of government (especially the federal government), and believed that it ought to be very jealously restrained.

Our father once told a newspaper that my mother was the most conservative person whom he had ever known (high praise, indeed, considering the source), but that is a highly partial appreciation of her. What our father was referring to was my mother's deep suspicion of government and her respect for a spontaneous order that gave wide range to individual effort. But Judge Henry Woods of Little Rock (not a political conservative) once described my mother to me as someone who was "involved in every righteous cause." I remember some of those causes: she supported the NAACP in the 'forties, wrote poems damning the KKK that were published in the local newspaper,

and threatened KKK members to their face that she would alert the FBI to any illegal activities that they might undertake. When she died, the *Texarkana Gazette's* editor opined that she was the most democratic person whom he had ever met. In other words, she was a person of liberality and tolerance, and tried to teach her sons to be the same.

The characteristics of my mother that I have described are not disparate, antagonistic aspects of a single personality, as some would think, but rather manifestations of a single, simple principle which she tenaciously adhered to. That principle was freedom and responsibility for all, without respect to race, color, or creed. Such a political philosophy used to be called liberalism, but that word has a decidedly different odor about it today because it comes freighted with a large dose of statism. Nowadays, we call that philosophy libertarianism.

When one adds to all this the fact that our father was general counsel for a large public utility, and thus spent a great part of his life battling the rural electrical cooperatives in court, it is not hard to see that my brother grew up in a distinctly Whiggish environment. I want to suggest that this was one influence that produced the profound respect, even reverence, for the bill of rights that his opinions frequently exhibit.

Two quick examples from my brother's opinions will suffice to demonstrate what I am talking about. The twin ordering principles of libertarian philosophical thought are property and contract (indeed, if there were space enough, it would be easy to demonstrate that these principles are, at bottom, but one). In a case that affirmed the denial of a motion to suppress evidence,² my brother observed in dissent that the "liberty of the citizen [was] seriously threatened" by certain police practices, and that "[t]he sanctity of private property, a precious human right [was] endangered" by them.³ (In one or two sentences, this opinion exposes to view the sophomoric character of jurisprudential attempts to differentiate privacy rights from property rights: The essence of both is the right to exclude.) Five years later, my brother, again in dissent, was moved to remark that the Contracts Clause of the constitution

2. *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992).

3. *Id.* at 397.

“is designed to safeguard a basic human right, the right to make private contracts.”⁴ If these two cases, which recognize property and contract as precious and basic human rights, do not expose to view a fundamental libertarianism at work, then I do not know how properly to characterize them.

Is not this high regard for individual rights and private ordering the best way to comprehend my brother’s controversial ruling in *United States Jaycees v. McClure*?⁵ In that case, he held that the Minnesota legislature’s attempt to force the Jaycees to take women as members violated the Jaycees’ rights to association and was thus unconstitutional. In the course of his opinion, my brother hinted, and hinted strongly, that he had no sympathy for the Jaycees’ position, but concluded that the Minnesota statute violated the constitution because “the right to choose with whom one *will* be associated necessarily implies, within some limits, the right also to choose with whom one *will not* associate.”⁶

Judge Patricia M. Wald of the District of Columbia Circuit has affected (as a rhetorical device, I suspect) to find this opinion “most enigmatic,” especially in the context of my brother’s intense insistence on protecting women’s rights in other cases.⁷ He had, for instance, as a district judge, in what Judge Wald quite correctly describes as “an exotic gender discrimination case about girls’ basketball rules,”⁸ struck down a state regulation that forced girls to play “half-court” basketball.⁹ But if one sees both the Jaycees’ case and the basketball case as manifestations of a healthy regard for individual liberty, their results are easily reconciled: They argue for constitutional protection of individual rights, whether the government is telling girls how to play basketball or telling men whom they must admit to their clubs. The Jaycees’ case, in other words, is nothing more than a reprise on those cases in which

4. *Honeywell, Inc. v. Minn. Life & Health Ins. Guar. Ass’n*, 110 F.3d 547, 562 (8th Cir. 1997) (en banc), *cert. denied*, ___ U.S. ___, 118 S. Ct. 156 (1997).

5. *United States Jaycees v. McClure*, 709 F.2d 1560 (8th Cir. 1983), *rev’d sub nom. Roberts v. United States*, 468 U.S. 609 (1984).

6. *Id.* at 1576 (emphasis in original).

7. *See* Wald, *supra* note 1, at 53.

8. *Id.* at 49.

9. *See* *Dodson v. Arkansas Activities Assoc.*, 468 F. Supp. 394 (E.D. Ark. 1979).

my brother expressed his admiration for the principles of contract and property. What the Jaycees had agreed (contracted) to do was to exclude someone (the essence of property/privacy). Viewed in this light, there is nothing whatever “enigmatic” about the holding in this case.

No one, certainly no judge worth his or her salt, is so simple-minded that the essence of his or her jurisprudence can be captured by a single word. In addition to being deeply informed by classical liberal principles, my brother’s opinions are shaped by, among other things, a highly practical sense of how the world works and the proper role of appellate judges. What I mean to suggest in this tentative look at a very select few of my brother’s numerous, varied opinions, is simply that a way of understanding some of them is that he believes that the constitution, in its bill of rights and elsewhere, contains robust guarantees of individualism, not puny ones, and that this attitude may well have been forged rather early on in his life. Other examples of this mindset at work might no doubt be usefully multiplied and dissected, but I shall leave that to others and to another day.

PHILIP HEYMANN*

When Richard Arnold and I worked in the same office at the Harvard Law Review as the two “case editors” before we graduated in 1960, his character was already powerful and in many ways, unique.

Obviously, he came to the second year of law school with an imposing reputation, not only because he was first in our law school class, but also because he had enjoyed similar distinctions at Yale College and before. Still, he was younger than many of us, at a stage in life when that could be a

* Philip Heymann is the James Barr Ames Professor at the Harvard University Law School.

disadvantage in argument, and his views of the law were far more grounded in precedent and history than most of the rest of us, who considered ourselves policy makers and legal realists. We sometimes thought of him as a brilliant anachronism, but if we tried to hammer that home in debate we were quite likely to have our arguments met and more than matched with surprising ease by Richard.

What was most striking then was that, although he liked to argue, he had no desire to dominate; that he believed more deeply than most of us in the law as an institution with its own rules; and that he was absolutely committed to intellectual as well as personal honesty. Even those who found his views too conservative would trust him to respond to their arguments openly, honestly, and respectfully.

Two other traits were already there although they would grow as the years went on. He had a sense of humor about himself, based in a deep sense of humanity and fallibility that has made him a great human being. And he had a sense of fairness to all that now shines through his opinions.

I was and am very lucky indeed to have Judge Arnold as a friend.

PRICE MARSHALL*

And thou shalt teach them ordinances and laws, and
shalt shew them the way wherein they must walk,
and the work that they must do.

Inscription on the front of Austin Hall at the
Harvard Law School, quoting *Exodus* 18:20.

* Price Marshall practices law with the Jonesboro, Arkansas law office of Barrett & Deacon, P.A. He served as a law clerk to the Honorable Richard S. Arnold from 1989-1991. Mr. Marshall also has the distinction of being the first subscriber to *The Journal of Appellate Practice and Process*.

It started with bow ties. One day at lunch, when I was attending Arkansas State University, I saw a lawyer friend at a restaurant. For some reason I was dressed up in a suit and a bow tie.

“You look like Richard Arnold,” he said.

“Who,” I asked, “is Richard Arnold?”

Several years later I was in law school, and I kept hearing about him. “Don’t worry about trying to write a perfect exam,” my civil procedure professor told my class. “It’s already been done, but only once.” And then my professor told us about a former student, now a federal judge in Arkansas, named Richard Sheppard Arnold. He wrote his civil procedure exam in a neat, printed handwriting that looked like typing between the lines of the paper. He cited every case by its complete name and correct citation. He addressed every issue thoughtfully and thoroughly. “Perfect,” my professor said. “You won’t be able to match that.” We didn’t.

I therefore knew it was blind luck when I got invited to Little Rock the next year to interview with Judge Arnold for a clerkship. I went to his house on a beautiful Saturday afternoon. Kay, his wife, met me at the door. “I’ll tell the Judge you’re here,” she said and offered me a seat. With the edginess of an interviewee, I latched onto Kay’s words and sat wondering: what kind of man was called “the Judge” by his wife?

“The Judge” and I talked for an hour—about Arkansas, politics, his brother, and London. The law came up a time or two. His words revealed a gentle spirit, a thoughtful nature, and an amazing mind. But I left perplexed because we had more of a conversation than an interview. Later I learned why. It wasn’t an interview. Judge Arnold is from the old school on clerkships, and he trusts and relies on the recommendations of a few close friends. I was only there to take what the Judge calls “the crazy test”: as long as the applicant is not crazy, he gets the job.

I passed. From August 1989 until August 1991 I served as one of Judge Arnold’s law clerks. It was the best job I’ve ever had.

* * *

RSA involved his clerks in each step of his work. My co-clerks and I divided and studied the briefs in the cases the Judge

was scheduled to hear. Then the three of us spent our afternoons circled around the Judge's desk, giving him what one of our predecessors called "book reports" on the cases. All the while RSA taught us the law under the pretense that we were preparing him for oral arguments.

One afternoon, a fellow clerk summarized an immigration case about a question of extradition.

"Do they cite *Ker v. Illinois*?" the Judge asked.

"No sir."

The Judge got up, went to his set of United States Reports, and pulled down a volume. He opened the table of contents and said quietly to himself, "I thought the name was spelled with one 'r,' not two." Flipping to the case as he walked back, he said, again only to himself, "Oh, it was a typographical error." Handing the book to my co-clerk, the Judge explained the holding in *Ker* to us and why this decision from 1886 controlled the case he was about to hear.¹ That is RSA: gifted with an encyclopedic knowledge of the law, and rarer still, blessed with the patience to teach young lawyers.

* * *

The Judge taught us more than the law. Unfailingly courteous, he treated every person with respect. To him, manners revealed morals, and he always stopped his work to talk—with us, with his fellow judges, and with the folks who cleaned the chambers as we worked into the evening together. RSA showed us that work could wait, but people could not.

The Judge also showed us how laughter leavens the day. One of my co-clerks kept a kangaroo doll (a souvenir from a trip to Australia) in her office. "Kanga" was always into mischief, and the Judge joined our antics. Once RSA got a telephone message from Kanga saying that she was in the Pulaski County Jail and needed his help. RSA responded with a note: "Call her back and tell her I am ethically forbidden to intervene."

The Judge loved a good laugh, especially on himself. A frequent visitor to chambers was an elderly woman who long ago had been a client at the law firm of Arnold & Arnold in

1. Compare 119 U.S. viii (table of contents listing *Kerr v. Illinois*), with *Ker v. Illinois*, 119 U.S. 436 (1886).

Texarkana. She had known wealth, but had fallen on hard times and often wandered in her own world. The Judge spent many hours listening to her troubles. But even his patience had limits. Returning from a cruise around the Mediterranean with Kay, he summoned all the law clerks and his two secretaries into his office. The elderly former client had telephoned him—in Istanbul—and talked his ear off. The Judge wanted to know who had given her the phone number of his hotel. The culprit, he said, would be boiled in oil. All of us pleaded innocent, and we were excused.

The next day, after the woman had come for a visit, the Judge called us all back in. He was laughing at himself. He was the culprit. Before he left he had told her about his trip and the stop in Istanbul. It had been easy to find him, she said, because there are only two good hotels in Istanbul and she knew he would be at one of them. The Judge apologized for doubting us, and we left him still laughing at himself.

The flow of our work in chambers was steady, but usually not overwhelming. At times, however, the flood came. Judge Arnold's reaction was always the same: when there was more to do than we possibly could, he slowed his pace. I would be caught up the rush, moving too fast and making mistakes. But the Judge would pause for breath, and take the extra care that comes from moving deliberately. His calm reassured us; it was more important to do the job right, than to get it done on some particular schedule.

Taking time for people, for laughter, and to do the job well. Only a great-souled man can keep such a balance when pressed by this world. And so the Judge showed us the way in which we should walk.

* * *

The Judge divided the cases that fell to him to write into three groups. Easy cases he wrote himself because he could do the work very quickly. Hard cases he wrote because they demanded it. And we clerks helped him write the opinions in the cases in the middle. The Judge would outline the court's reasoning, provide the architecture of the opinion, and then put one of us to work. We usually worked on one opinion at a time. His timetable for us never varied: "Work on it until you get it

exactly right.” When we were done, the draft opinion went to his conference table with the briefs and the record. And after he revised it, and made it completely his own, he circulated the draft to the other judges on the panel.

He expected our best in our work. When we let him down, he corrected us gently and reminded us to keep striving to do better. We lived for his comments on our draft opinions. They came in his small printed hand, in black ink, at the top right corner of the first page. An “excellent draft” could lift your spirits for days. A “very good job” always brought contentment. His comments, however, were not always sweetness and light; they were the truth. I recall a draft that I had hurried through. He kept my first sentence and rewrote the rest of the opinion himself. That was his comment. And I learned from it that high expectations are the best teacher.

The Judge had some general rules for opinions. First, the facts had to be correct. No exceptions. So we studied trial records, checked facts, and double-checked each other’s work—all to be sure that every opinion kept faith with the record. Second, every opinion had to be understandable to the losing party—not only to his lawyer, but also to the litigant himself. The Judge insisted that his opinions rest on reasons and explanations, not case citations and conclusions. That seemed right to me then, but I did not really understand until I started practicing law; now I’ve lost cases, and had to explain why to clients, and I do. Third, the Judge’s opinions had to be well written. He insisted that we learn the difference between “that” and “which,” where “only” goes in a sentence, that “breach” is a noun and not a verb, and when to hyphenate phrasal adjectives. As RSA told us, it makes some difference whether you mean a purple people-eater, or a purple-people eater. Following the rules of grammar and usage made our thinking and our writing clearer. It also taught us the importance of being faithful in small things.

The Judge is fond of Holmes’s advice: the craftsman’s task is “to hammer out as compact and solid a piece of work as one can, to try to make it first rate, and to leave it unadvertised.”²

2. OLIVER WENDELL HOLMES, JR., *The Class of '61*, in *THE ESSENTIAL HOLMES* 94 (Richard A. Posner ed., 1992).

Echoing Holmes in his example and his precepts, RSA showed us the work we must do.

* * *

Lawyers often comment on the bow ties I wear, and ask if I picked that up from Judge Arnold. I smile, say no, and leave it there. The truth is deeper. Bow ties are not his mark on me. But the little law I've ever really understood, the balance I seek in my life, and the habit of sticking to my work until the job is done as well I can do it—all these and more I owe to him.

RICHARD W. GARNETT*

Judge Arnold has joked that his appointment to the bench was based on “merit”—“[his] merit was that [he] worked for a Senator.”¹ Well, I’m not a judge; I was just a law clerk.² But, like Judge Arnold, I got my job on “merit”: My “merit,” and the reason I had the privilege of clerking for Judge Richard,³ was that his brother, Judge Morris (“Buzz”) Arnold, had the good sense to hire my wife. One brother did a favor for the other and, as a result, I was blessed with the chance to spend a year in Arkansas pilfering the Whitewater jurors’ snacks, hiking in the Ozarks, and learning from Judge Richard.⁴

* Richard W. Garnett is an associate with Miller, Cassidy, Larroca & Lewin in Washington D.C. He served as one of Judge Arnold’s law clerks during the 1995-1996 term.

1. Richard S. Arnold, *Trial By Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 1 (1993).

2. Just to be clear, law clerks are not judges. Some people these days appear to have lost sight of this fact. See, e.g., EDWARD LAZARUS, CLOSED CHAMBERS (1998); Tony Mauro, *Corps of clerks lacking in diversity*, USA TODAY, March 13, 1998, at 12A. Judge Arnold has not, which is just one of the many reasons he is a good judge.

3. I hope Judge Arnold knows that his extended “chambers family” often calls him (though not to his face) “Judge Richard,” and his brother, “Judge Buzz.” If not, I apologize for this “leak.” In fact, this would not be the first time I’ve mistakenly spilled the beans to the Judge. I once inadvertently let slip in Judge Arnold’s company the “secret” that, when he is out of town, his clerks wear jeans.

4. Judge Arnold’s own clerkship, with Justice Brennan, came about through more

I don't think it is news to anyone who knows anything about the law that Judge Richard Arnold is a great federal judge. He is very, very smart—one of the stories about him in Washington is that, when he left Covington & Burling, the associates had to start going back to the library⁵—and he is gracious, devout, and wise. He is precisely the sort of judge, and his decisions display just the kind of reasoned and thoughtful craftsmanship, that law reviews should be praising, law students studying, and lawyers emulating. I was honored to work for him and I am proud to know him.

This is—no surprise—not the first time that Judge Arnold has been honored in the law reviews. A few years ago, the *Minnesota Law Review* published several tribute articles about the Judge, in part—or so it seems to me—to make the case that Judge Arnold belonged on the Supreme Court.⁶ (He does.) One of those articles contained a few nuggets about the life and work of a Judge Richard law clerk.⁷ The piece was, for the most part, accurate. It is true that he decides cases for himself, he reads all the briefs, he dictates a lot of his own opinions, and he doesn't *really* need us. But, with all due respect to the article's distinguished authors, their account could use a little “filling out.”

For instance, it has been said that the Judge divides his cases into “three broad categories: If they are simple, he writes the opinions himself because they can be completed in a few minutes. If the case presents a difficult issue, he also writes the opinion himself because he is unsure what exactly to instruct the law clerk to do. The medium cases, he divides for first draft purposes among his four clerks.”⁸ I suppose this is how the Judge looks at it. But remember, he is an uncommonly smart person. And just so the taxpaying public knows that his law

orthodox channels. See Richard S. Arnold, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 5, 5 (1997) (“In those kinder and gentler days, one did not apply for the job; it was simply offered.”).

5. For example, Judge Arnold knew, off the top of his head, who was the only Pope in history to abdicate (Celestine V).

6. William J. Brennan, Jr. et al., *A Tribute to Chief Judge Richard S. Arnold*, 78 MINN. L. REV. 1 (1993).

7. John P. Frank & A. Leon Higginbotham, Jr., *A Brief Biography of Judge Richard S. Arnold*, 78 MINN. L. REV. 5, 11-12 (1993).

8. Frank & Higginbotham, *supra* note 7, at 11.

clerks try to earn their salaries, and on behalf of every Judge Richard clerk who has ever sweated over what certainly *seemed* to be a “difficult issue,” I respectfully dissent from the “Judge Arnold keeps all the hard cases” theory. That said, it is true and as it should be that, as the Judge told us early in our clerkship year, “The clerks may draft a lot of the opinions, but I write all of them.”⁹

For the law clerks, the high drama in the opinion-drafting process was when the Judge strolled across the hall to the clerks’ offices with our re-worked first drafts. His meticulously printed edits would be scattered throughout the draft, along with re-written sentences, requests for further research, questions, grammatical changes, stylistic flourishes, and, often, mysterious Latinisms. Most important for us, though, in the upper-right corner, there would usually be a few cryptic, printed syllables—“O.K.,” “Good,” “First-rate job,” or, in my case, “too long.” (That the Judge keeps long-winded clerks in line is another reason, or illustration of, why he is such a good judge.)¹⁰ I don’t think I have been prouder in my short legal career than when the Judge returned my draft in what seemed to me to be a tricky tax case with “excellent” written at the top-right.

The other Eighth Circuit clerks’ introduction to the Judge usually comes in St. Louis, at an orientation held during the court’s first fall sitting. I remember that we were to be drilled on the Sentencing Guidelines and other mysteries of federal practice. Judge Arnold began the session with a short talk on drafting opinions, and the talk was as Strunkian as his opinions.¹¹ He asked us please not to use the phrase, “totality of the circumstances.” That phrase, he thought, is turgid, ponderous, and over-wrought. “The circumstances” does the job just fine. Also, he urged, avoid referring to the principles announced in cases, or to the steps in a process of legal reasoning, as “tests” with “prongs.” So, I spent a fair bit of time translating the Supreme Court’s ever-increasing body of prong-law to “factors that guide our analysis” or “steps in our reasoning.”

9. He also told us, “The opinions are 50% yours and 100% mine.”

10. Frank & Higginbotham, *supra* note 7, at 20 (“The typical Arnold opinion is short and never windy.”).

11. WILLIAM STRUNK, JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* 23 (3d ed. 1979) (“Omit needless words.”).

The Judge also taught me and all the other clerks the value of judicial courtesy. He is unfailingly polite to the lawyers who argue before him, even, frankly, when they step out of line. He is respectful and attentive even in the most drop-dead-boring cases. And, in every case argued by appointed counsel, he goes out of his way to thank the attorneys for their assistance—"We appreciate your taking this case. It is a big help to us." In fact, ever since I left my clerkship, I've been angling for an appointed case in the Eighth Circuit, just so I can hear the Judge say that to me.

I sometimes joke that a job with Judge Arnold has the best intellectual-satisfaction-to-stress ratio of any legal job in the country. I suppose this is why I have so many wonderful memories from my clerkship (without the horror stories that seem to go with the territory in other chambers): Waiting in line at a greasy, noisy, sweaty, and outstanding Little Rock barbecue joint, the Judge in seersucker, reading slip opinions; the Judge and his brother chiding each other in Latin over dinner in St. Louis; our chambers betting pools (not for money, of course) during the early 1996 primaries, and the Judge's hilariously poor predictions;¹² the daily trip to the jury room to scavenge a few doughnuts—chocolate for the clerks, plain glazed for the Judge; my co-clerk's efforts to convince the Judge that good coffee really is better than bad coffee; the Judge at his Christmas party proudly introducing his guests to the results of my (perfectly legal) home-brewing efforts as "Eighth Circuit brew"; and the sight of all his former clerks, his staff, his wife, and even the President (on video), sporting bow ties at the party celebrating his 15th anniversary on the bench.

Now, the Judge is a bit of an aristocrat, and a Southern Gentlemen, in the true and best sense of both those words,¹³ so we law clerks were under no illusions that we were his

12. The Judge actually predicted that Senator Gramm would win the New Hampshire primary.

13. Frank & Higginbotham, Jr., *supra* note 7, at 5 ("Before Richard Arnold was born . . . , the good fairies gathered and agreed to bestow upon him three gifts: a silver spoon for his mouth, an uncommon brilliance for his mind, and a profound sense of spirituality for his heart."). Professor Thomas Shaffer has written a variety of wonderful articles on the "Southern Gentleman Lawyer," which remind me of Judge Arnold. *See, e.g.*, Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181 (1981).

“buddies.” But it was precisely because he usually maintained just the right amount of dignified and professional distance from us that it was so much fun when, for whatever reason, the distance shrank. Because he didn’t tell us everything he was thinking, we were able to enjoy sitting in our cramped offices across the hall from his, in Little Rock’s relatively decrepit federal courthouse, wondering “what the Judge would think” about various things.

* * *

When Judge Arnold offered me a job, I have to admit that I knew little about him other than that he was viewed by many as a longtime acquaintance of President Clinton’s and likely nominee to the United States Supreme Court. But soon after I learned that Judge Arnold was the judicial equivalent of *papabile*, my real introduction to him came when I read his short opinion dissenting from the *en banc* Eighth Circuit’s denial of a motion for a stay of execution in *Schlup v. Delo*,¹⁴ a death-penalty case.¹⁵

Briefly, Lloyd Schlup insisted that he was “actually innocent” of murdering a fellow inmate in Missouri, and that his factual innocence constituted sufficient cause to permit the *habeas* court to review his otherwise-barred claim that his trial counsel had been ineffective. Judge Arnold’s short opinion—it is only a few paragraphs long—is an excellent example of his judging. There is in the opinion no fiery rhetoric, no self-righteousness, no indignant accusations, and no hand-wringing. Instead, the judge set out clearly and succinctly two legal questions that, in his view, were sufficiently “deserving of this Court’s *en banc* time.”¹⁶

14. 11 F.3d 738, 754 (8th Cir. 1993) (Arnold, C. J., dissenting from denial of suggestion for rehearing *en banc* and of motion for stay of execution), *vacated*, 513 U.S. 298 (1995).

15. On my first day at work, I inherited from my predecessor law clerk a list of “Arnold-isms,” which included a warning regarding Judge Arnold’s careful attention to the demands of the unit-modifier rule, citing one of his recent opinions, *Reed v. Woodruff County*, 7 F.3d 808, 809 (8th Cir. 1993) (“The report also stated that [the deceased] killed himself, apparently unintentionally, while engaged in auto-erotic asphyxiation.”). Old habits die hard.

16. *Schlup*, 11 F.3d at 755.

On the first point—whether the *Sawyer v. Whitney*¹⁷ “no reasonable juror” standard or the *Kuhlmann v. Wilson*¹⁸ “fair probability” standard applies when a *habeas* petitioner seeks to avoid a procedural default on grounds of factual innocence—Judge Arnold candidly acknowledged that “[the] panel did what it had to do” in rejecting Schlup’s claim, because it was bound by an earlier Eighth Circuit case interpreting *Sawyer*.¹⁹ However, Judge Arnold believed that the earlier panel might have misread *Sawyer*, and that the full court should correct the earlier panel’s mistake. Notwithstanding the seriousness of the question, and his doubts about the merits of the earlier panel’s decision, it didn’t appear to occur to Judge Arnold that the *Schlup* panel could or should have disregarded it. To some, this might seem an insignificant point; to me, though, it shows Judge Arnold’s respect and commitment, even in hard cases, to the rule of law.

Next, Judge Arnold noted that, in *Herrera v. Collins*,²⁰ a majority of the Supreme Court Justices appeared to have recognized that compelling evidence of actual innocence might serve as a free-standing ground for *habeas* relief, and not simply as a “gateway” for review of otherwise barred claims.²¹ While maintaining a proper deference to the panel judges’ view of the evidence in Schlup’s case, Judge Arnold suggested that the case appeared to him a plausible occasion for invoking *Herrera*. The Judge recognized that *en banc* review by an appellate court is not generally the appropriate forum for deciding such “fact-intensive question[s] But where human life is at stake, I believe that rehearing *en banc* is appropriate whenever a petitioner makes a substantial claim.”²²

As it turned out, the Supreme Court agreed with Judge Arnold.²³

I realize that Judge Arnold’s little opinion in *Schlup* is not the usual grist for law-review tributes. And I recognize that the

17. 505 U.S. 333 (1992).

18. 477 U.S. 436 (1986).

19. *Schlup*, 11 F.3d at 755.

20. 506 U.S. 390 (1993).

21. *Schlup*, 11 F.3d at 755.

22. *Id.*

23. *Schlup v. Delo*, 513 U.S. 298 (1995). Judge Arnold appears to have better luck in the Supreme Court when he is dissenting than when he writes the majority opinion. See *infra*.

Schlup case was far more complicated than the above few paragraphs might suggest. In my view, though, the Judge's short dissent showed clearly what good judging should look like. In fact, I thought of that opinion when I read Judge Arnold's recent tribute to Justice Brennan, in which he praised the opinion in *Cooper v. Aaron*²⁴ (written by Justice Brennan) by pointing out that, in addition to being just and right, it was "not verbose" and "gentle in manner, strong in substance."²⁵ I know that *Schlup* is no *Cooper v. Aaron* (except to Mr. Schlup), but, in both cases, as Judge Arnold would put it, "[t]he maxim, *suaviter in modo, fortiter in re*, comes to mind."²⁶

The opinion in *Schlup* is short, clear, respectful, reasonable, modest, and rigorous—all qualities sometimes missing in death-penalty decisions.²⁷ Judge Arnold did not accuse the *en banc* majority or the panel of bloodthirsty insensitivity nor did he suggest that the court had or should have free rein to toss aside the Supreme Court's demanding and sometimes deadly standards governing post-conviction procedure, even in a case that, like *Schlup*'s, presented the real danger of the ultimate miscarriage of substantive justice. "[H]uman life [was] at stake,"²⁸ and, while not a license for intemperance or lawlessness, that fact was enough to warrant the most exacting judicial scrutiny the law permits.

* * *

24. 358 U.S. 1 (1958).

25. Arnold, *supra* note 4, at 7.

26. *Id.*

27. See, e.g., *Kills on Top v. State*, 928 P.2d 182, 213 (Mont. 1996) (Trieweller, J., specially concurring) ("The dissent touches all the politically correct buttons."); *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) ("Power, not reason, is the new currency of this Court's decisionmaking.") (Marshall, J., dissenting); *Callins v. Collins*, 510 U.S. 1141 (1994) (Scalia, J., concurring in denial of petition for writ of certiorari); *Id.* at 1141 (Blackmun, J., dissenting from denial of petition for writ of certiorari). In general, Judge Arnold's opinions in death-penalty cases have reflected at the same time his respect for juries, lower courts, and state judges and his commitment to providing the full and fair review that such serious cases and grave government conduct require. See, e.g., *Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995) (systematic exclusion of blacks from jury in capital case violated the Equal Protection Clause); *Chambers v. Bowersox*, 157 F.3d 560 (8th Cir. 1998).

28. *Schlup v. Delo*, 11 F.3d 738, 755 (Arnold, C. J., dissenting from denial of suggestion for rehearing *en banc* and of motion for stay of execution).

The same month Judge Arnold wrote his dissent in *Schlup*, the *Minnesota Law Review* published its above-mentioned tribute.²⁹ I read the various articles to prepare for my interview, and they certainly made me want the job. But, looking back—and I hope the Judge and the distinguished lawyers and judges who contributed to the tribute will forgive me—I cannot help thinking that the well-meaning tribute failed to do the Judge justice. It seems to me today that, rather than identifying, explaining, and praising the Judge's talents, the articles aimed more at "selling" Judge Arnold to those who presumably were advising President Clinton on nominations to the Supreme Court. It is almost as if the tribute were designed to smuggle Judge Arnold's reasonableness past a gaggle of suspicious ideologues and self-appointed guarantors of progressive purity.³⁰

In my view, though, for what it is worth, it is *precisely* because Judge Arnold's devotion to, for example, the demands of the First Amendment is not something that wanes as the importance of political litmus tests waxes that he is such a principled, respected, and valuable judge, and that it may truly be said that he is "Justice Black revived."³¹ For instance, to hear

29. See Brennan, *supra* note 6.

30. See Patricia M. Wald, *Judge Arnold and Individual Rights*, 78 MINN. L. REV. 35, 50, 52 (1993) ("Some women's groups have skeptically viewed Arnold's position in abortion cases. Except for perhaps one case, I think his record stands up well as a defender of a woman's right to control her own body under the strictures of *Roe v. Wade*. . . . Even in dissent, orthodox feminists must recognize that his position is in most respects far more expansive than the present Supreme Court's. Judge Arnold's critics must play fair among all suspects in assessing alleged heresies.") (footnotes omitted). I suppose it could just as well be said that in that "one case"—*Webster*—Judge Arnold demonstrated, by holding that a State *may* write into law, for purposes unrelated to abortion, its commitment to the principle that human life begins at conception, the independence from political orthodoxies and ideological demands that good judging requires. See *Reproductive Health Serv. v. Webster*, 851 F.2d 1071, 1085 (8th Cir. 1988) (en banc) (Arnold, J., concurring in part and dissenting in part), *rev'd*, 492 U.S. 490 (1989).

Judge Wald also thought it necessary, apparently, to assure her audience that even a judge consigned to the hinterlands of the Eighth Circuit could have the requisite familiarity with individual-rights cases. Wald, *supra*, at 36. Speaking as a big fan of the Eighth Circuit and its judges, I cannot help wondering whether the citizenry should be more concerned about filling the Supreme Court with judges from Judge Wald's own D.C. Circuit, where the docket seems to consist primarily of acronyms suing other acronyms under statutes known by acronyms.

31. Frank & Higginbotham, *supra* note 7, at 23. It is worth noting, I think, that the same is true of Judge Arnold's brother Judge Buzz, also a brilliant and principled judge, on "the other side" (to the extent they are on different "sides") of the political spectrum. See Frank & Higginbotham, *supra*, at 22 (noting that Judge Arnold is "the liberals' favorite

some of his tribute-bearers tell it, the sole blot on Judge Arnold's judicial career is his opinion in *United States Jaycees v. McClure*.³² In that case, Judge Arnold wrote an opinion holding that Minnesota's public-accommodations law, which prohibited sex discrimination, was insufficient warrant to permit the State to infringe the Jaycees' First Amendment rights of association.³³ In the Judge's view, "if, in the phrase of Justice Holmes, the First Amendment protects 'the thought that we hate,' it must also, on occasion, protect the association of which we disapprove."³⁴

Some have sought to push this opinion aside (as if the Supreme Court's 9-0 reversal were not enough on that score!) as aberrational or "enigmatic."³⁵ Judge Wald quipped, "even at his peak, Jack Nicklaus had an off-day,"³⁶ and concluded that "[f]or recognition of the rights at stake, he gets an A; for balancing, he gets a B-."³⁷ But I believe Judge Arnold deserves praise for his constitutional courage in that case, not patronizing condescension.³⁸ Presumably, in accord with the today's established First Amendment method, he should have engaged in a convoluted, multi-factored, utterly contrived "weighing" of various elements and "prongs,"³⁹ the results of which would be—surprise!—one that accorded with his own beliefs about the importance of eradicating sex discrimination. Instead, the Judge decided the case as he believed the Constitution required. Although Judge Wald gave the opinion a "B-" (and the Supreme Court flunked him), I think Justice Black would be proud.

The same could be true, I think, of Judge Arnold's interesting dissent in *Richenberg v. Perry*.⁴⁰ In that case, the

conservative and the conservatives' favorite liberal").

32. 709 F.2d 1560 (8th Cir. 1983), *rev'd sub nom.* *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *see* Wald, *supra* note 30.

33. *McClure*, 709 F.2d at 1569-78.

34. *Id.* at 1561.

35. Wald, *supra* note 30, at 53.

36. *Id.*

37. *Id.* at 56.

38. *Id.* at 35 ("Judge Arnold's progression has been stunning—he surely has many more miles to go.").

39. There's that word again.

40. 97 F.3d 256 (8th Cir. 1996).

majority upheld the military's "Don't Ask, Don't Tell" policy toward homosexuals. The Judge avoided the temptation to dive headlong into the controversial moral and political underpinnings of that policy—the opinion's measured tone reminds me of the *Schlup* dissent—and instead insisted that the failure to permit Captain Richenberg to rebut the presumption that, because he is gay, he would necessarily engage in prohibited conduct, effectively and unconstitutionally punished him for his thoughts, not his actions: "To assume automatically that he would [violate the military's policy] is to disadvantage him simply for who he is and not for what he has done or will do."⁴¹ The Judge reminded us that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds."⁴²

This healthy suspicion of attempts by government or anyone else to prescribe political orthodoxy,⁴³ and his commitment to protecting even the "speech that we hate," comes through again and again in his decisions. In *Forbes v. The Arkansas Educational Television Commission*⁴⁴—another case where the Supreme Court parted company with Judge Arnold—the court held that a state-owned television station could not exclude Ralph Forbes, a fringe candidate for Congress who had qualified for placement on the ballot, on the purely subjective ground that he was not a "viable" candidate. Much to the dismay of the latte-and-public-television crowd, the Judge sided with Forbes's First Amendment claim, and agreed that a government-run news outlet has no constitutional business screening out "non-viable" candidates. As the Judge put it, "[p]olitical viability is a tricky concept. We should leave it to the voters at the polls, and to the professional judgment of

41. *Richenberg*, 97 F.3d at 264.

42. *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 557 (1969)).

43. In another example, Judge Arnold joined Judge Fagg's majority opinion in *Twin Cities Area New Party v. McKenna*, 73 F.3d 196 (8th Cir. 1996), *rev'd sub nom. Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), striking down Minnesota's ban on "fusion" candidacies, a ban that, he and Judge Fagg believed, served no purpose other than advancing the interests of the two dominant political parties and violated the First Amendment rights of third-party members. Again, though, it appears from the Supreme Court's reversal that the Judge's participation in the case turned out to be the kiss of death.

44. 93 F.3d 497 (8th Cir. 1996), *rev'd*, 118 S. Ct. 1633 (1998).

nongovernmental journalists. A journalist employed by the government is still a government employee.”⁴⁵

Another example: In *United States v. Dinwiddie*,⁴⁶ while upholding the “Freedom of Access to Clinics Act” in the face of a *Lopez*-inspired⁴⁷ Commerce Clause challenge, the Judge remained sensitive to the danger that efforts to restrict disorderly speech and conduct around abortion clinics pose to First Amendment rights.⁴⁸ Thus, after resolving the Commerce Clause question in a straightforward and succinct manner,⁴⁹ the Judge held that, notwithstanding the occasionally threatening nature of Ms. Dinwiddie’s pro-life protesting, the district court’s “vague and overinclusive” injunction violated her First Amendment rights.⁵⁰ For instance, the district court purported to forbid Ms. Dinwiddie from airing her view—even to a newspaper reporter—that “abortion is a violent, violent business and that violence begets violence.”⁵¹ Judge Arnold insisted that such remarks, however irresponsible, were “pure speech” and that the injunction was an “unconstitutional viewpoint-based restriction on speech.”⁵² Other judges have not been so vigilant.⁵³

My point here is simply that Judge Arnold’s dedication to the text and values of the First Amendment has been unswerving, even in those cases where a slight deviation might have been more pleasing to those who make book on Supreme Court nominations. I think it a more fitting tribute to Judge Arnold to praise this consistency, which Justice Black shared, than to explain it away.

45. *Forbes*, 93 F.3d at 504.

46. 76 F.3d 913 (8th Cir. 1996).

47. *United States v. Lopez*, 514 U.S. 549 (1995).

48. *Dinwiddie*, 76 F.3d at 917-919.

49. *Id.* at 919-921. Although Judge Arnold’s opinion was one of the first decisions by a federal court of appeals on the constitutionality of the statute, he resisted the temptation to write a Commerce Clause treatise, and instead simply decided the case.

50. *Id.* at 927.

51. *Id.* at 928.

52. *Id.*

53. See, e.g., *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992), *aff’d*, 67 F.3d 359 (2d Cir. 1995), *vacated in part on rehearing en banc sub nom. Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (en banc), *aff’d in part, rev’d in part*, 519 U.S. 357 (1997).

* * *

In Judge Arnold's contribution to the *Harvard Law Review's* symposium in honor of the late Justice William J. Brennan, Jr., the Judge said, "[t]hat clerkship was the best job I ever had."⁵⁴ Same here, Judge.

ANNE COHEN*

It is more than fitting that this inaugural issue of *The Journal of Appellate Practice and Process* should include a tribute to Richard Sheppard Arnold, Judge of the United States Court of Appeals for the Eighth Circuit. The reason, however, is not simply his widely acknowledged scholarship and even wisdom as a federal judge. One of his college classmates and fellow circuit judges has said, "Richard is smart like Learned Hand was smart."

Increasingly, those who shape the law—judges, legislators, practitioners of all stripes, trial and appellate judges—are compartmentalized and specialized, with mutual distrust and disdain common and even encouraged. Richard Arnold, on the other hand, continues to live happily in a world of law that is broadly defined. In his "big tent" of jurisprudence, the participants revel in the critical roles that each set of legal actors plays in the development of American law.

Much of this is attributable, of course, to the fact that he has participated in most of the arenas where law is grown—law review editor, law clerk, lawyer, political operative (had he actually been a *politician*, he might have won one of those elections), legislative and executive aide, trial and appellate judge.

There are few jobs in our legal system that Richard has not held; the breadth of his experience and his appreciation of the

54. Arnold, *supra* note 4, at 5.

* Anne Cohen is a partner at Debevoise & Plimpton in New York, New York. She served as one of Judge Arnold's law clerks during the 1985-1986 term.

different skills these positions require may be as significant to his judicial development as his basic smarts. In the same way Judge Arnold cherishes the complicated way in which the American law is developed and practiced, those of us lucky enough to serve as his clerks learned that healthy (but not blind) deference to the other components of that system is critical to maintenance of the rule of law as well as to success in legal playing fields.

He does not, for example, consider himself the third senator from the state of Arkansas (as much as he might have coveted the job). A story about Justice Brennan, for whom Judge Arnold clerked and who is perhaps the only non-family member in the RSA Pantheon, told us about the difference between legislation and common law. Remarking on a draft opinion from another set of chambers, Justice Brennan noted that the proposed decision should begin not “We hold” but “Be it enacted.”

Similarly, Richard has enormous regard for the other actors in the judiciary, and approaches each new matter with the expectation that the trial court, counsel, parties, and jury have taken their responsibilities seriously. Nevertheless, we also learned that judges, lawyers, legislators, and litigants, as human beings, are by definition bound to err, and that error, while to be avoided, is best confronted by patience and explanation. As readers of Arnold opinions may note, only when decisions are affirmed is the trial judge identified by name; those reversed are just the eastern or western district of some state. (Similarly, there is no such thing as a “lower court” in an RSA opinion.) I learned the hard way that even Judge Arnold—or at least his clerks—could goof. Eighteen months after my clerkship ended, Judge Waters of the Western District of Arkansas ruled against my client based on an Arnold decision that had been written during my tenure. Graciously, but with perhaps more amusement than necessary, Judge Waters explained that both he *and* then district judge Buzz Arnold considered the decision to be erroneous but that he was, of course, bound by the Eighth Circuit. (When I sheepishly recounted this episode to RSA, his response to the compelling argument against the decision was—paraphrased—“Whoops.”)

Judge Arnold is testament to the principle (hard to grasp in certain Eastern area codes) that there are eleven federal circuit

courts of appeal and not just three (Second, District of Columbia, and Other), not to mention state appellate courts. A clerkship with Richard Arnold implicitly teaches that courts west of the Hudson and south of the Potomac have skill and authority equal to those anywhere. (Indeed, even D.C. residence may not be enough. I cannot adequately describe the look on RSA's face when he heard that one of my law school classmates withdrew his three remaining Supreme Court clerkship applications because, the fellow said, after Justice So-and-so picked, all of the "good justices" were taken.)

So there is something delicious about this great judge and this exciting new journal being based in Little Rock. And there can be no better valediction for this enterprise that, in helping us think about "appellate law and process," it does so in a way that does not lose sight—as Richard Arnold never has—of the sometimes frustrating and often wonderful contraption that is our legal system.

